APR 25 1932
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IN EQUITY NO. 826

Supreme Court of the United States

OCTOBER TERM 1931

ED. SPROLES, APPELLANT,

vs.

T. BINFORD, ET AL, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF ON BEHALF OF TENNESSEE DAIRIES, INC., INTERVENOR.

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JURISDICTION

This suit in equity to enjoin and restrain the enforcement of Texas General Laws (Forty-Second Legislature Regular Session 1931) c. 282 upon the ground that it is unconstitutional was brought in the United States District Court for the Southern District of Texas.

The bill of complaint was filed on August 18, 1931. (R. 1). This intervenor, Tennessee Dairies, Inc., filed with the permission of the lower court its intervention on September 2, 1931. After hearing before a statutory court, organized pursuant to 28 U. S. C. Section 380, the temporary injunction prayed for in the bill was denied, November 6, 1931. (R. 116) The opinion of the Court is reported in 52 F. (2d) 730. (R. 103)

A final hearing of this cause was then had and a final decree dismissing the bill was rendered and filed on February 5, 1932. (R. 125) The opinion of the Court, as yet not reported is found on page 119 of the Record.

By an order filed March 19, 1931, an appeal to this Court was allowed. (R. 147) The cause was advanced by this Court on joint motion and set for argument on April 25, 1932.

STATEMENT OF CASE

(a) The business of this intervenor.

This intervenor, Tennessee Dairies, Inc., is a Texas corporation. It is not a carrier for hire but is engaged in the business of gathering and marketing dairy products. (R. 57) In connection with this business it purchases milk from over four hundred farmers. (R. 57) It maintains and operates concentrating and cooling stations in four towns in the vicinity of Dallas, Texas. (R. 58) Milk is delivered to these stations by the individual farmer twice daily, where it is placed in large glass-lined Thermos tanks, mounted on wheels, having capacities from 1000 to 1575 gallons of milk. (R. 58) Apart from the economies of distribution, this use of special motor equipment represents a very important advance in the sanitary handling of a most important food product.

The tanks, with one exception, are mounted upon semi-trailers which are hauled over the highways from the concentrating point to Dallas by means of short wheel-base truck tractor units. One tank is not mounted on a trailer, but upon a Mack truck. (R. 58) Intervenor has invested about $30,000 in the described trucks and special equipment.

These tanks are designed to carry from 9,000 to 12,000 pounds of milk. (R. 130) The lengths of the round trips from the concentrating stations to Dallas and return are 45, 100, 140 and 146 miles. (R. 58, 59) Intervenor's vehicles, however, operate with load only from the concentration points to Dallas; the return trip is without load. (R. 58, 59)

If, as a consequence of the Texas statute now in question, intervenor may only transport on its equipment loads of 7,000 pounds it will be compelled, if it is able to continue its system of collection of milk, to double the number of trips from each of the four stations at approximately double the present cost. (R. 59) The limitation

of the load to 7,000 pounds will increase intervenor's operating costs by from $100.00 to $120.00 per day. (R. 130)

(*b*) The statute complained of.

The relevant portions of the statute in question, Texas General Laws (Forty-Second Legislature Regular Session 1931) c. 282, are printed *in extenso* in the Record, pages 8 to 15. Briefly summarized, it prohibits trucks from operating over the highways of Texas with a net load in excess of 7,000 pounds, except those transporting property between the point of origin or destination of that property and "the nearest practicable common carrier receiving or unloading point equipped to transport such load".

The avowed purpose of this statute is "for the benefit of public safety and protection of the highways". (R. 15)

The lower court has held that this statute, as applied to this intervenor, as well as the appellant and the other intervenors, is constitutional. It is urged that this decision was error.

THE CONTENTIONS OF THIS INTERVENOR

This intervenor does not propose here to argue all the propositions set forth in the appellants' Statement of Points. (R. 407-409) In dealing only with certain considerations which seem peculiarly applicable to its situation, it does not intend to suggest any doubt of the soundness of the points to which it does not here refer but which are argued by other counsel in whose contentions the authors of this brief join.

This intervenor is particularly concerned with those provisions of the statute which restrict the net weight of load which it may transport in its motor equipment. As to these provisions, it contends:—

(1) That Section 5 violates the equal protection clause of the Fourteenth Amendment in that it applies to and limits the load which may be carried upon trucks, tractors

and trailers such as this intervenor uses but does not apply to or affect other types of motor vehicles.

(2) That Section 7, which permits the carriage by truck between the point of origin or destination of the freight carried and the nearest practicable common carrier receiving or unloading point of a load of 14,000 pounds, while by Section 5 this intervenor is limited to 7,000 pound loads in the carriage which it performs, creates an arbitrary and unconstitutional discrimination against it;

(3) That the statute as a whole is arbitrary and unreasonable in itself, is not reasonably adapted to the ostensible legislative purpose, and is in fact intended not for the protection of the highways but to accomplish an economic result by its effect upon competition in transportation; that it, therefore, deprives the intervenor of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

I.

Section 5 Violates the Equal Protection Clause of the Fourteenth Amendment

Section 5 provides in part:

> "No commercial motor vehicle, truck tractor, trailer or semi-trailer shall be operated on the public highway outside the limits of an incorporated city or town with a load exceeding seven thousand (7000) pounds on any such vehicle or train or combination of vehicles; no motor vehicle, commercial motor vehicle, truck-tractor, trailer or semi-trailer, having a greater weight than six hundred (600) pounds per inch width of tire upon any wheel concentrated upon the surface of the highway shall be operated on the public highways outside the limits of an incorporated city or town; . . . "

"Commercial Motor Vehicle" is defined in Section 1 as "any motor vehicle other than a motor-cycle, designed or

used for the transportation of property, including every vehicle used for delivery purposes". In the same section "Motor Vehicle" is defined to include "every vehicle, as herein defined, which is self-propelled", and "vehicle" is defined as "every mechanical device upon or by which any person or property is or may be transported or drawn upon a public highway."

While the restriction of six hundred pounds per inch width of tire applies to both trucks and busses, the 7,000 pound load limitation applies only to trucks; busses are not so restricted. The only other weight limitation applied to busses is found in Texas General Laws (Forty-First Legislature, Second Called Session 1929), c. 8, sec. 8, B. This statute was not specifically amended or repealed by the statute here in question. It reads in part as follows:

> "Provided that no vehicle shall be registered with four wheels, or less, whose gross weight, including load, exceeds 22,000 pounds; that no vehicle shall be registered with six wheels, whose gross weight, including load, exceeds 30,000 pounds; (axles of the latter type to be spaced not less than 40 inches apart)."

In order to compare and to determine the inequality resulting from these statutory provisions, it is necessary to reduce the 7,000 pound net load restriction upon trucks to its approximate equivalent in gross weight. The lower court found as a fact that "There is a direct relation between net load and gross load of a motor truck." (R. 137) This conclusion was necessary to the decision for it is plain that the direct relation of weight to that highway protection which is the ostensible purpose of the statute is that of the gross weight of vehicle and load applied through the wheels to the pavement. The court evidently arrived at this necessary conclusion by the acceptance of the undisputed evidence from the appellants that it is not profitable, and therefore is economically prohibitive, for them to operate the equipment which they own with loads constantly much less than

capacity. (R. 173, 176, 179, 206, 382, 384). With this is combined an assumption, predicated upon certain testimony, that the weight of a truck approximately equals the weight of the load it is designed to carry. (R. 206) It follows that Section 5 will, in most instances at least, restrict the gross weight of loaded trucks to about 14,000 or 15,000 pounds.

The result is that while trucks by section 5 may weigh only 15,000 pounds gross, busses are permitted to operate, and are in fact operating (R. 195, 219), with a gross weight of 22,000 pounds, or if equipped with six wheels, with a gross weight of 30,000 pounds. The lower court recognized this factual discrimination in its opinion upon final hearing. It was there said (R. 123):

> "It is contended *and shown* that the combined weight of vehicles and load carrying persons as passengers, for hire, is greater than will be the combined weight of vehicles and load carrying freight, for hire, unless the weight load is limited to seven thousand (7000) pounds, and that the damage to the highways is as great from a load of persons as a load of freight." (Italics ours.)

The distinction drawn between trucks and busses is without constitutional justification in a statute of this character.

The principles of permissible classification need no extended discussion: Classification must rest upon some real and substantial distinction; mere difference is not enough. *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37. And, what is more important, the distinction, the line of demarcation between those included within, and those exempt from, the operation of the statute, must bear a reasonable and substantial relation to the object of the legislation. *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S. 175; *Southern Ry. Co. v. Greene*, 216 U. S. 400; Brandeis, J., dissenting in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 406. Unless these prerequisites are found to be complied with, the attempted classification creates an arbitrary and an unconstitutional discrimina-

tion. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Smith v. Cahoon*, 283 U. S. 553.

The avowed object of this statute is set forth in the emergency clause contained in Section 15, which reads: "The importance of this measure for the benefit of the public safety and protection of the highways creates an emergency . . ."

These purposes, the preservation of the highways and of the safety in their use, are of course within the police power of the state of Texas. *Morris v. Duby*, 274 U. S. 140. The inquiry is whether Section 5 which excludes trucks with a net load of more than 7,000 pounds or a gross load of approximately 15,000 pounds while admitting busses which are subject only to the liberal gross weight provisions of Texas General Laws (Forty-First Legislature, Second Called Session 1929) c. 88, sec. 8 B, embodies a classification which bears a reasonable and substantial relation to the objects expressed in the statute.

Putting aside, for the moment, the evidence of highway experts and engineers, we may say with confidence that to the mind of the layman no inherent difference exists, with respect to the highway preservation and safety, between a bus and a truck of the same weight and with the same tire and safety equipment.

Governor Dan Moody of Texas, in his message to the Texas Legislature recommending further legislation restricting the weight of motor vehicles, did not recognize the advisability of, or the necessity for, any such distinction. To quote from his message (R. 364):

> "Laws should be enacted placing further limitations upon the size and weight of the busses and trucks that may be legally operated upon the public highways of this State. The most modern and improved safety devices, appliances and practices should be required by law. In enacting a law placing further limitations upon the size, weight and speed of trucks and busses, a reasonable time should be allowed to dispose of trucks and busses, the use of which would be prohibited by such limitations."

Nor has such a distinction any legislative precedent. In none of the weight limitation statutes enacted and in force in states other than Texas, nor in the modern statute passed in Texas in 1929 (Texas General Laws (Forty-First Legislature, Second Called Session, 1929) c. 42, section 5), which was superseded by section 5 now under consideration, is any such distinction made between carriers of property and carriers of passengers. This Texas legislative situation is unique among the forty-eight states. The statement of this Court in *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37 that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision" is peculiarly applicable.

There is nothing in the record to support the conclusion of the lower court that this classification bears a reasonable relation to the purposes of this statute. That court specifically found that passenger busses operating in Texas are "similar in many respects in construction to trucks carrying freight," but went on to say that "the difference between these two types of vehicles", among other things, "is reasonably related to the objects sought to be accomplished by this law", (R. 135) The court, however, wholly failed to indicate what this "difference" is.

The uniform evidence of the experts is that no difference in wear and safety upon the highways is to be found between a bus of a certain weight and a truck with a similar gross weight and equipment. (R. 194, 211, 219, 223, 226, 228, 235, 239, 284) The resultant damage, if any, is the same.

The evidence clearly shows that the two important factors are (1) gross weight and (2) speed. (See e.g. R. 172, 178, 283.) The greater the gross weight and speed, the more detrimental to the highways. As was testified by George A. Knapp, appellees' expert witness (R. 284):

> "Taking the macadam type of highway, with a passenger bus which has a weight when filled with

> passengers of approximately 25,000 pounds, moving at a speed of 45 miles per hour, and a commercial truck similarly equipped and built, weighing approximately 5,000 pounds, and with it its load of 7,000 pounds, or a total of 12,000 pounds, the relative effect of those two vehicles running over that identical stretch of highway so far as a damage to highway is concerned (fol. 506) would be the greater weight, and the greater speed would do the greater damage."

By the provisions of the statute, not only are busses permitted to operate with gross weights of approximately twice that allowed trucks, but furthermore, by Section 9 of the act, busses are legally allowed to travel at the speed of 45 miles an hour while commercial motor vehicles are restricted to the rate of 25 miles an hour.

It is suggested by the lower court in its opinions that the classification may be supported by the fact that there are many more commercial motor vehicles or trucks than there are carriers of passengers or busses. In this the court has clearly fallen into error. If, as we contend, there is no reasonable distinction for the purposes of highway preservation and safety, between these two types of vehicles, both fall within the same class, and the distinction which the statute draws is arbitrary. This is true regardless of how few of those who fall within the same class are exempt. For example, the number of contract carriers in Florida who engaged in transporting farm and dairy products "from the point of production to the assembling or shipping point en route to primary market" must, it would seem, have been exceedingly small. This court, however, held that an exemption of such carriers from the provisions of a Florida statute requiring liability insurance constituted an unconstitutional discrimination. *Smith v. Cahoon,* 283 U. S. 553, 566-567.

In short, the lower court failed to recognize the apparent paradox, present in every equality case, that the legislature when it fails to include within the effective scope of the statute all the persons within a particular class, does less than it might but more than it may.

It is argued that the exception of busses from the operation of Section 5 is justifiable because busses are subject to the jurisdiction of the Railroad Commission. The fallacies of this argument need only be briefly summarized.

1. There is *no* provision to be found in Tex. Stat. (1928) 911-A, the statute vesting the Commission with certain powers over motor busses operated for hire, which, fairly construed, gives the Commission authority to limit the net or gross weight of all busses. The nearest approach to this is found in Tex. Stat. (1928) 911 A, sec. 7, which provides in part:

> "The Commission shall also ascertain and determine if a particular highway or highways designated in said application are of such type of construction or in such state of repair, or subject to such use as to permit of the use sought to be made by the applicant, without unreasonable interference with the use of such highway or highways by the general public for highway purposes. And if the Commission shall determine, after hearing . . . that such highway or highways are not in such state of repair, or are already subject to such use as would not permit of the use sought to be made by the applicant without unreasonable interference with the use of such highway or highways by, the general public for highway purposes, then in either or any (of) such event said application may be denied and said certificate refused. . . ."

It is manifest, however, that it does not permit the Commission to fix a blanket maximum for all busses. This is recognized in the statute under consideration, by the application to busses of the 600 pound per inch width of tire restriction.

2. Common and contract carrier trucks are also subject to the Commission's jurisdiction. Texas General Laws (Forty-First Legislature, Regular Session 1931) c. 277, sec. 14 vests the Commission with broad authority "to approve or disapprove the nature and character of the equipment to be used under said permit or certificate

and the amount and character of tonnage which may be hauled thereunder on any motor vehicle, trailer or semi-trailer used under such permit or certificate . . ." Quite obviously the power of the Commission in this respect is much greater with regard to trucks than busses.

3. Even if the Commission had complete power to control the maximum weight of busses, the discrimination would still exist, and this because it has never attempted to exercise such power. The evidence undisputably shows that busses weighing in excess of 20,000 pounds operate over substantially every primary Texas highway. Whether the inequality arises from the failure of the legislature, or of the Commission, to exercise its power is immaterial.

It is submitted that no rational basis for this apparent discrimination between this intervenor and those operating passenger busses over the highways which he traverses with his trucks can be found which bears a substantial, or even a tenuous, relationship to the promotion of highway safety and preservation.

II.

Section 7 Is So Vague and Uncertain That It Is Unconstitutional

Section 7 provides as follows:

> "The limitations imposed by this Act as to length of vehicle or combination of vehicles and weight of loads and of height of vehicle with load shall not apply to vehicles when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination, provided said vehicle does not pass a delivery or receiving point of a common carrier equipped to transport said load, or when used to transport property from the point of origin to point of destination thereof when the destination of such property is less distant from the point of origin thereof than the nearest practicable common carrier receiving or loading point equipped to transport such

> load; provided, however, that in no event except by special permit, as hereinabove specifically provided, shall the length of said vehicles exceed fifty-five (55) feet or the weight of such loads exceed fourteen thousand (14,000) pounds; and provided, further, that the limitations imposed by this Act upon weight per inch width of tire shall apply to all such vehicles and loads; provided that if this Act or any other section, subsection, sentence, clause or phrase thereof, is held to be unconstitutional and invalid by reason of the inclusion of this section, the Legislature hereby declares that it would have passed this Act and any such section, subsection, sentence, clause or phrase thereof without this section."

This is a penal statute. Section 15 provides a criminal penalty for the violation of any of its provisions.

The fact that this exemption is stated to be as to vehicles "when used only to transport property . . . to the nearest practicable common carrier receiving or loading point" is an example of the remarkable draftsmanship which characterizes this statute and throws light upon the legislative situation and intention which it reflects. It has already been remarked that the legislature chose to depart from the simple, direct and universal measure of the relation between weight and highway use which it had adopted in the 1929 statute in conformity with general practice among the states, by substituting for gross weight of the loaded vehicle, a measure of "load" alone which can only be shown to have any relation to highway wear by making certain assumptions as to the weight of vehicles under assumed practical conditions of commerce. So here instead of saying "railroad station" if the legislature meant "railroad station," the phrase "common carrier receiving point" was used.

It is however contended by appellees that this phrase does not mean "railroad station"—a construction which would make the unconstitutionality of the exemption fairly apparent—but that it includes "receiving points" of common carrier truck lines. The learned District Court adopted this construction.

With great respect, it is submitted that this is an unwarranted construction because it makes the exemption meaningless. It is well known that to the common carrier truck line every shipping room platform is a receiving or unloading point. "Store door pick-up and store door delivery" is one of the reasons for the existence of truck transportation. It follows therefore that under the construction adopted by the court there is no room in which the exemption may operate. It is familiar learning that a construction should not be adopted which will give to a statute an absurd result.

If, however, the construction contended for is adopted, it is plain that it is impossible to determine in advance whether any proposed carriage is or is not within the exemption.

To the general situation of vagueness and uncertainty, the use of the qualifying phrase "nearest practicable" applied to "receiving point" and of "shortest practicable" applied to "route" adds further indefiniteness. A simple illustration will show the extent to which "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.* 269 U. S. 385, 391. Let us assume that "common carrier receiving point" means something more definite than any place at which a truck may stop and take on a case of goods. Let us assume that a shipper is at point A., that he wishes to ship in his own truck to point B. and that the nearest "receiving point" is point C., the three points making a triangle, the distance from A. to B. being twelve miles and that from A. to C. ten miles. Let us also assume that the highway from A. to C. while passable is in bad condition. How can the unlucky shipper tell whether his proposed delivery is within the exemption or not?

This court said in *United States v. Cohen Grocery Co.*, 255 U. S. 81, 92:

> "Penal statutes prohibiting the doing of certain things and providing a punishment for their violation

should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

III.

Section 7 Violates the Equal Protection Clause of the Fourteenth Amendment

Section 5 prohibits commercial motor vehicles from using the highways when carrying a net load in excess of 7,000 pounds. Section 3 provides that no such vehicle shall exceed thirty-five feet in length, and that no combination of such vehicles shall exceed forty-five feet.

Section 7 provides for an exception to these restrictions. Vehicles which are used "only to transport property from point of origin to the nearest practicable receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination . . . or when used to transport property from the point of origin to the point of destination thereof when the destination of such property is less distant from the point of origin thereof than the nearest practicable common carrier receiving or loading point equipped to transport such load" are permitted by this section to operate with loads of 14,000 pounds and lengths of fifty-five feet.

If this section is not invalid because of the vague uncertainties which it contains, this intervener contends that it creates a classification which does not bear the remotest relation to highway safety and preservation.

The classifications center solely upon the destination of the load carried by the particular truck. If it is destined for the nearest practicable common carrier or for the place of business of the consignee from the nearest common carrier unloading point, then it may carry a 14,000 pound load; if the destination is other than these, the law permits a load of only 7,000 pounds.

The distinction rests not upon the design or equipment of the vehicle, the quality of the road to be traversed, or the dangerous character of the articles transported. A vehicle may carry 14,000 pounds to a railroad station, but the same vehicle travelling over the same road to a destination beyond that point is restricted to one-half that load.

Nor can the classification be supported on the ground that it is enacted to provide for the occasional and infrequent load of a character which cannot be reasonably dismantled or divided into units of 7,000 pounds or less. Such contingencies are fully provided for by section 2 which vests the State Highway Department with power to grant limited permits for the transportation of such loads over the highways. Section 7, on the other hand, permits a 14,000 pound load of any character provided it is on the way to or from a common carrier.

No illustration is necessary to demonstrate that every foot of the highways of Texas lies on a route between the point of origin or destination of a potential 14,000 pound load of freight and "the nearest practicable common carrier receiving point". Every inch of these highways may be lawfully traversed by commercial motor vehicles having loads of 14,000 pounds. Yet of two identical vehicles carrying identical loads, one will be legally operated because its journey began at "a common carrier receiving point" and the other will be illegally operated because its journey began 200 yards further away.

A truck with a carrying capacity of 14,000 pounds may have a gross weight, when loaded to capacity, of 27,500 to 30,000 pounds (R. 244). The preexisting Texas weight statutes (Texas General Laws (Forty-first Legislature, Second Called Session 1929) c. 42, sec. 5) fixed 22,000 pounds as the maximum weight for four wheel vehicles. Thus, every Texas highway is subjected, by virtue of section 7, to a greater weight and greater resulting damage than before the enactment of that section always providing that the vehicle does not pass a common carrier re-

ceiving point. Furthermore, it is estimated that a large portion of the heavier traffic permitted by section 7 will fall upon the secondary or class B highways which by construction are the least capable of carrying the greater weight. (R. 330, 387)

The only reason advanced by the lower court in its opinion in support of this unique exception is that "the evidence shows that the average distance of the hauls under this Section will be approximately four to eight miles" (R. 110). This finding must be based upon the testimony of R. G. Waggener, appellees' witness, who presented the only evidence upon this point. (R. 328-330) In passing it is worth noting that in arriving at his result this witness considered not only the railroad receiving and unloading points, but established collecting stations of existing common carrier motor trucks as well. (R. 328) Assuming, as the lower court apparently did (R. 110), that the witness correctly construed the section to include common carriers by motor vehicle as well as by rail and water, the fallacy of his method of approach is manifest. Under this construction common carriers by truck are the only ones who may not operate trucks to carry 14,000 pounds by the favor of section 7. On the other hand, such carriers are now equipped largely with trucks of capacities greater than 7,000 pounds. These trucks, as the record clearly shows, can not profitably operate if section 5 becomes effective. The result manifestly will be that the number of common carriers by motor vehicle will greatly diminish with the advent of this 7,000 pound net load limitation. And since section 5 and its counterpart, section 7, will become effective simultaneously, the distances which may be travelled under section 7 cannot be fairly estimated without consideration of this shrinking effect of section 5.

Assuming, however, the correctness of these figures they have no convincing bearing upon the reasonableness of the classification in support of which they are presented. As has been pointed out, every foot of road in Texas may be used by trucks transporting 14,000 pound

loads. There is no limitation upon the number of such movements. With the inception of the 7,000 pound load maximum imposed by section 5, the store-door-pick-up and delivery of less carload freight to and from rail freight yards, which section 7 is clearly framed to permit and promote, will naturally and materially increase. The actual reduction of heavier traffic mileage will be exceedingly small, certainly not large enough to justify the obvious discrimination which is created by section 7.

A conclusive answer to the argument that the classification may be supported because it permits only short hauls of four to eight miles in length lies in the fact that it does not include all movements by truck for such distances. A truck which is destined for a point four miles away can or cannot transport a 14,000 pound load depending on whether there is or is not a common carrier receiving point situated on the route between the shipper's place of business and the ultimate destination. In other words, even if an exemption of short hauls constituted a valid classification, Section 7 is invalid because it includes and favors only some such hauls and excludes others.

Smith v. Cahoon, 283 U. S. 553, is a case directly in point. The Florida statute there in issue exempted from its operation "any transportation company engaged exclusively in the transporting of agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp *from the point of production to the assembling or shipping point en route to primary market* or to motor vehicles used exclusively in transporting or delivering dairy products." (Italics ours) This court held that this exemption from the provisions of the statute requiring liability insurance created a classification which bore no relation to the public safety. This court said (283 U. S. at 567):

> "This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the state to

> insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right."

The mileage of the vehicles falling within the scope of the exception in *Smith v. Cahoon* must have been small. Not only was the destination of the freight transported an element of the classification but the number of the vehicles included within the exemption was diminished by the additional restriction as to the nature of the goods transported. Therefore it was obvious on the face of the statute that as compared with those members of the class subjected to the terms of the statute, the excepted vehicles were small in number and in road mileage. Yet this court determined that an arbitrary and unconstitutional discrimination existed.

Whatever may be the conclusion regarding the constitutionality of the other provisions, or the Act as a whole, it is confidently submitted that section 7 is invalid both because of indefiniteness and because of the arbitrary discrimination which it creates. This section furthermore is most eloquent as evidencing the true purpose of the legislature in enacting this whole statute and as demonstrating its unreasonable and unconstitutional character.

IV.

The Statute as a Whole Is Not Reasonably Calculated to Promote the Ostensible Purpose of the Legislature But Is Unreasonable and Arbitrary. It Therefore Deprives This Intervenor of Its Property Without Due Process of Law.

It is clearly established that this statute seriously affects the value of the intervenor's investment in motor equipment, increases the cost of its business operations and, in short, deprives it of its property.

If this deprivation has been caused by a statute enacted in the valid pursuance of the police power, this intervenor has, of course, no ground for complaint under the Federal Constitution. That the ostensible and declared purpose of the statute, "for the benefit of the public safety and the protection of the highways", is a purpose within the police power is not disputed.

But if a statute, even though enacted in pursuance of a purpose within the police power, is not reasonably "calculated to effect that purpose" (*Burns Baking Co. v. Bryan*, 264 U. S. 504, 517), if it is essentially unreasonable and arbitrary, (*Norfolk & W. R. Co. v. Public Service Comm.* 265 U. S. 70, 74) if it can not be said of it that "the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals", (*Lawton v. Steele*, 152 U. S. 133, 137), the statute is, notwithstanding the validity of its alleged purpose, void.

Measured by these tests this statute must fail.

We are concerned here with a limitation upon the load which, under the statute, may be carried upon a motor truck. It is of course plain that so far as weight is a factor of importance in "the protection of the highways" the load is only important as one of the constituents of the gross weight applied to the highway. The significance of resort to this indirect and unscientific measure of "load" has already been discussed. It is enough here to repeat

that one would not expect a legislature sincerely concerned with highway protection to adopt a measure of lawful use which can be shown to have any relation whatever to highway protection only by a somewhat elaborate process of reasoning based upon assumptions drawn from the incidents of current commercial motor vehicle design and operation. But the deduction to be drawn from the legislature's choice of this extraordinary standard becomes very much more striking when one considers the statute of Texas which by the passage of this act was discarded.

The old law, Texas General Laws (Forty-first Legislature, Second Called Session 1929) c. 42, sec. 5 provided:

> "No vehicle with four wheels or less, whose gross weight, including load, is more than 22,000 pounds; no vehicle with six wheels, whose gross weight, including load, is more than 30,000 pounds, (axles of this type of vehicle to be spaced over 40 inches apart); no vehicle having a greater weight than 16,000 pounds on any one axle, and no vehicle having a greater weight than 700 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of solid rubber tires to be measured between the flanges of the rim), shall be permitted or operated on the public highways of this State. When the axles of any vehicles or any combination of vehicles are spaced less than 8 feet apart, the load on any axle shall not exceed 10,400 pounds, provided, however, that when any vehicle equipped with not more than two axles, shall have one of said axles mounted upon four wheels (two wheels at each end of the axle operating in tandem), the maximum weight permitted on each axle of this type shall not exceed 18,000 pounds."
>
> "No commercial motor vehicle, truck, tractor, trailer or semi-trailer shall be operated on the public highway with a gross weight in excess of more than five per cent of its registered gross weight."

That the statute of 1929 was framed with the aid of advanced highway engineering knowledge is apparent from the uniform evidence of experts that the distribu-

tion of the weight on a vehicle, i.e., the amount of weight concentrated upon each wheel or axle, is of supreme importance. (R. 172, 178, 191, 194, 206, 209) Thomas A. MacDonald, Chief of the United States Bureau of Public Roads, expresses this (R. 188):

> "If a truck of greater gross load was so balanced by the manufacturer as that it does not have to exceed 18,000 pounds on rear wheels, it would do no more damage to the highway, whether its gross weight was more than 23,000 pounds or less than 23,000 pounds."

By discarding in 1931 this statute of 1929, the State of Texas departed both from modern scientific engineering practice and from the recognition of that engineering practice found in the statutes of practically every other American State. All that this legislation retained of the advance in method which its predecessors, and especially its immediate predecessor, had made was the restriction to 600 pounds per inch of tire width. This restriction has a manifest relation to highway preservation. *It is applied to all vehicles using the highways. The 7000 pound "load" is applied only to trucks which carry a load past a common carrier receiving or unloading point.*

If a weight limitation is in fact reasonably designed to preserve the highways by reducing the weight applied to them by the vehicles which use them, it is plainly to be expected that it *will* reduce the weight. This statute as already has been shown actually permits an *increase* of weight of all motor busses and of all trucks which do not pass a common carrier receiving or unloading point while under load. It has already been remarked that while the business of this intervenor will be effectively ruined by this statute, every foot of Texas highway will be subjected under this statute to greater weights than those permitted under the statute which it replaces.

There was much talk in the record about the alleged "over-loading" of trucks and consequent damage to the highways, and damage to the travelling public. What is meant is the placing upon a truck of a load greater than

that which it was designed to carry. So far as highway preservation is concerned, this is important particularly in relation to the distribution of the load upon the axles and to the tire widths of the equipment. Exactly in what manner the present statute is supposed to cope with this alleged evil is not clear. What is clear is that the superseded statute dealt specifically with this subject matter. It expressly prohibited more than a 5% overloading. Presumably it was enforced by the authorities of Texas. If it was not or if for practical reasons its enforcement was difficult, it is manifest that the restriction of loads to 7000 pounds will naturally lead to a desire to carry that weight upon the lightest and most economical available equipment and the tendency toward "overloading" so far as it existed will be increased.

Finally, in so far as the factor of public safety, as distinguished from highway protection, is concerned it is plain that the tendency of the statute will be to eliminate larger, slower moving vehicles and to substitute a very much increased number of smaller and more rapidly moving vehicles. The effect upon congestion and upon safety of traffic conditions is manifest.

The exemptions of the statute which have been discussed are significant in themselves. They are perhaps even more significant in the light they throw upon the statute as a whole. The statute will cripple the business of those in the situation of the intervenor which, it will be recalled, by operating its own motor equipment has freed itself from the exactions of carriers for hire, whether by truck or carriers by railroad, and has substituted therefor an economical, modern and individual transportation service. It will severely handicap carriers of property for others, unless the service is the purely adjective one of carriage to or from "a common carrier receiving point". It will greatly tend to protect from competition transportation by means other than motor trucks while permitting the economical conduct of "pick up and delivery service" to and from those common carrier receiving and unloading points operated by the railroads. These

results it will achieve and to them it is reasonably adapted.

But it will not reduce the weight upon the highways or tend to their preservation. It will not promote public safety. To these, the ostensible purposes of the statute it is not reasonably adapted.

Ultimately, whether in fact a statute was passed for a purpose within the constitutional competency of the legislature is to be judged by the results which it produces. As this court said in *Soon Hing v. Crowley*, 113 U. S. 703, 710, 711:

> "And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the Acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motive of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments."

And the very court which decided this case below, in holding unconstitutional a companion statute passed by this same legislature, relating to this same subject matter, said in *McLeaish & Co. v. Binford*, 52 F. (2d) 151, 155:

> "Disregarding pretense, subterfuge and chicane, courts must, looking through form to substance, ascertain the true purpose of a statute, neither from its recitals of purpose nor from the evidence as to what the real purpose of its authors and backers was, but from the operation and effect of the statute as applied and enforced."

It is enough to say here that for the reasons given, this statute is not reasonably adapted to the purpose admittedly within the legislative competence which it purports to serve. If judged by its results, that purpose was not the real purpose, the constitutional invalidity is only the more glaring. The matter may perhaps be left with the following quotation from the minority report of the con-

ference committee of the legislative bodies which enacted the statute. (House Journal, Forty-second Legislature, Regular Session, May 14, 1931, p. 2246):

> "This bill purports to be a measure designed for the protection of the highways, but as recommended by the majority of this committee it is a measure designed to protect rail carriers from competition of the traffic upon the highways. The bill is clearly designed to allow the operation of busses as now conducted by the railroads, but will have the effect of eliminating trucks as a factor of competition with rail carriers."
>
> "The effort to eliminate the trucks without disturbing the busses results in a piece of legislation that is somewhat grotesque and clearly departs from any logical argument that protection of the highways is afforded or intended."
>
> * * * * * * * * * * * * *
>
> "We of the minority cannot approve a measure designed for the protection of one industry that requires virtual confiscation of millions of dollars of equipment already purchased, while at the same time resulting in no public benefit, but on the other hand certain to result in a definite increase in the transportation cost of this State. Furthermore, passage of the measure recommended by the majority will result in loss of position to hundreds of men immediately and to thousands next January 1, at a time when other places are almost impossible to find."

CONCLUSION

It is therefore respectfully submitted that the provisions of this statute, considered separately and as a whole, are unconstitutional and void.

Respectfully Submitted,

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APRIL, 1932